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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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10 IN RE: Bard IVC Filters Products
11 Liability Litigation,

No. MDL 15-02641-PHX-DGC

12 _____
13 Maria Alarcon, an individual,

No. CV-17-00197-PHX-DGC

14 Plaintiff,

15 v.

TRANSFER ORDER

16 C. R. Bard, Inc., a New Jersey
17 corporation; and Bard Peripheral
18 Vascular, Inc., an Arizona corporation,

Defendants.

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20
21 This multidistrict litigation proceeding (“MDL”) involves personal injury cases
22 brought against Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc.
23 (collectively, “Bard”). Bard manufactures and markets medical devices, including
24 inferior vena cava (“IVC”) filters. The MDL Plaintiffs received implants of Bard IVC
25 filters and claim they are defective and caused Plaintiffs to suffer serious injury or death.

26 The MDL was transferred to this Court in August 2015 when 22 cases had been
27 filed. Doc. 1. More than 8,000 cases had been filed when the MDL closed on May 31,
28 2019. Docs. 18079, 18128.

Thousands of cases pending in the MDL have settled. *See* Docs. 16343, 19445, 19798, 21167, 21410. The remaining cases no longer benefit from centralized proceedings. Since August 2019, the Court has suggested the remand of more than 100 cases that were transferred to this MDL by the United States Judicial Panel for Multidistrict Litigation (the “Panel”), and has transferred to appropriate districts more than 2,500 cases that were directly filed in the MDL. *See* Docs. 19899, 20672, 21462, 21589, 21820, 22036.

The Court erroneously dismissed one case, *Alarcon v. C. R. Bard, Inc.*, No. CV-17-00197, as duplicative. Doc. 21461. The Clerk’s Office has reopened the case. Doc. 22108. Counsel for Plaintiff Alarcon has informed the Court that the case has not settled and remains pending. The Court will transfer the case to the United States District Court for the Central District of California, Los Angeles Division.

I. Transfer Under 28 U.S.C. § 1404(a).

A. Transfer Standard.

Section 1404(a) provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”

B. The Direct-Filed *Alarcon* Case Will Be Transferred.

Not all MDL cases were transferred to the Court by the Panel. Pursuant to Case Management Order No. 4 (“CMO 4”), many cases were filed directly in the MDL through use of a short form complaint. Doc. 363 at 3 (amended by Docs. 1108, 1485). Plaintiffs were required to identify in the short form complaint the district where venue would be proper absent direct filing in the MDL. *See id.* at 7. CMO 4 provides that, upon the MDL’s closure, each pending direct-filed case shall be transferred to the district identified in the short form complaint. *Id.* at 3.

Plaintiff Alarcon’s short-form complaint states that she is a California resident and that she resided there at the time of her implant and alleged injuries. No. CV-17-00197,

1 Doc. 1 at 2. The complaint identifies the Central District of California, Los Angeles
 2 Division, as the District and Division in which venue would be proper absent direct
 3 filing. *Id.* at 2. Pursuant to § 1404(a), the Court will transfer Plaintiff's case to that
 4 District and Division. *See In re Biomet M2a Magnum Hip Implant Prods. Liab. Litig.*,
 5 No. 3:12-MD-2391, 2018 WL 7683307, at *1 (N.D. Ind. Sept. 6, 2018) (transferring
 6 cases under § 1404(a) where they would "no longer benefit from centralized
 7 proceedings[] and the remaining case-specific issues are best left to decision by the courts
 8 that will try the cases"). Defendants' right to challenge venue and personal jurisdiction
 9 upon transfer is preserved. *See* Docs. 19899 at 4-6, 20672 at 4, 21426 at 4.

10 **II. The MDL Proceedings.**

11 A summary of the MDL proceedings is provided below to assist courts receiving
 12 transfers under § 1404(a). CMOs, discovery orders, and other significant rulings are
 13 listed in Exhibit 1. *See* Doc. 21727-1. Exhibits admitted at the bellwether trials are listed
 14 in Exhibit 2. *See* Doc. 21727-2. The status of the remaining case-specific discovery and
 15 other pretrial issues in individual cases should be addressed by the courts receiving the
 16 cases on remand or transfer.

17 **A. Plaintiffs' Claims and the Pleadings.**

18 The IVC is a large vein that returns blood to the heart from the lower body. An
 19 IVC filter is a small device implanted in the IVC to catch blood clots before they reach
 20 the heart and lungs. This MDL involves multiple versions of Bard's retrievable IVC
 21 filters – the Recovery, G2, G2X, Eclipse, Meridian, and Denali. These filters are
 22 umbrella-shaped devices that have multiple limbs fanning out from a cone-shaped head.
 23 The limbs consist of legs with hooks that attach to the IVC wall and curved arms to catch
 24 or break up blood clots. Each of these filters is a variation of its predecessor.¹

25

26 ¹ In early 2019, Defendants moved to expand the scope of the MDL to include
 27 cases concerning Bard's Simon Nitinol Filter ("SNF"), a permanent device that predicated
 28 the other IVC filters in this litigation. The Panel denied the motion as moot because
 more than 80 SNF cases already had been filed in the MDL. None of the SNF cases are
 subject to this order.

1 The MDL Plaintiffs allege that Bard filters are more dangerous than other IVC
 2 filters because they have higher risks of tilting, perforating the IVC, or fracturing and
 3 migrating to vital organs. Plaintiffs further allege that Bard failed to warn patients and
 4 physicians about these higher risks. Defendants dispute these allegations, contending
 5 that Bard filters are safe and effective, that their complication rates are low and
 6 comparable to those of other IVC filters, and that the medical community is aware of the
 7 risks associated with IVC filters.

8 CMO 2, entered October 30, 2015, required the creation of a master complaint, a
 9 master answer, and templates of short-form complaints and answers. Doc. 249 at 6. The
 10 master complaint and answer were filed December 12, 2015. Docs. 364, 366. They are
 11 the operative pleadings for most of the cases in this MDL.

12 The master complaint gives notice, pursuant to Rule 8, of the allegations that
 13 Plaintiffs assert generally. The master complaint contains seventeen state law claims:
 14 manufacturing defect (Counts I and V); failure to warn (Counts II and VII); design defect
 15 (Counts III and IV); failure to recall (Count VI); misrepresentation (Counts VIII
 16 and XII); negligence per se (Count IX); breach of warranty (Counts X and XI);
 17 concealment (Count XIII); consumer fraud and deceptive trade practices (Count XIV);
 18 loss of consortium (Count XV); and wrongful death and survival (Counts XVI and XVII).
 19 Doc. 364 at 34-63. Plaintiffs seek both compensatory and punitive damages. *Id.* at 63.

20 Plaintiff-specific allegations are contained in individual short-form complaints or
 21 certain complaints served on Defendants before the filing of the master complaint. *See*
 22 Docs. 249, 363, 365. Plaintiffs also provided Defendants with profile forms and fact
 23 sheets that describe their individual claims and conditions. *See* Doc. 365.

24 **B. Case Management Orders.**

25 The primary orders governing pretrial management of this MDL are a series
 26 of CMOs, along with certain amendments. To date, the Court has issued 49 CMOs.
 27 These orders are discussed below and can be found on this District's website at <http://www.azd.uscourts.gov/case-info/bard>.

1 **C. Lead Counsel.**

2 CMO 1, entered October 30, 2015, appointed Co-Lead/Liaison Counsel for
 3 Plaintiffs (“Lead Counsel”) to manage the litigation on behalf of Plaintiffs, and set out
 4 the responsibilities of Lead Counsel. Doc. 248. Plaintiffs’ Lead Counsel has changed
 5 since the inception of the MDL. Mr. Ramon Lopez, of Lopez McHugh, LLP, in Newport
 6 Beach, California, and Mr. Mark O’Connor, of Beus Gilbert PLLC, in Phoenix, Arizona,
 7 are now Lead Counsel for Plaintiffs. Doc. 5285. Mr. Richard North of Nelson Mullins
 8 Riley & Scarborough, LLP, in Atlanta, Georgia, is Defendants’ Lead Counsel.

9 **D. Plaintiffs’ Steering Committee and Common Benefits Fund.**

10 CMO 1 directed the selection and appointment of a Plaintiffs’ Steering Committee
 11 (“PSC”) to assist in the coordination of pretrial activities and trial planning. Plaintiffs’
 12 Lead Counsel and the PSC together form the Plaintiffs’ Leadership Counsel (“PLC”).
 13 The PLC assists all Plaintiffs in the MDL by overseeing discovery, appearing in court,
 14 attending status conferences, and preparing motions and responses regarding case-wide
 15 discovery matters. CMO 1 has been amended to select and appoint a Plaintiffs’
 16 Executive Committee (“PEC”) to assist Lead Counsel in the administration, organization,
 17 and strategic decisions of the PLC. Doc. 4016. The configuration of the PSC has
 18 changed during the course of the litigation. *See* Docs. 248, 4016, 5285.

19 CMO 6, entered December 18, 2015, set forth rules, policies, procedures, and
 20 guidelines for fees and expenses incurred by attorneys acting for the common benefit of
 21 all MDL Plaintiffs. Doc. 372. In May 2019, the Court increased the common benefit
 22 attorneys’ fees assessment from 6% to 8%, but declined to increase the 3% assessment
 23 for costs. Doc. 18038.

24 Upon remand or transfer, individual Plaintiffs likely will be represented by their
 25 own counsel – the attorney or attorneys who filed their original complaint. Plaintiffs’
 26 Lead Counsel, the PSC, the PLC, and the PEC were tasked with managing the MDL for
 27 Plaintiffs, not the individual cases on remand or transfer.

1 **E. Status Conferences.**

2 Since the inception of the MDL, the Court has held regular status conferences with
 3 Lead Counsel for the parties to discuss issues related to the litigation. The initial case
 4 management conference was held in October 2015. Doc. 246. Deadlines were set for,
 5 among other things, the filing of master and short-form pleadings, profile forms, a
 6 proposed protective order (including Rule 502 provisions), a proposed protocol
 7 governing the production of electronically stored information (“ESI”), as well as
 8 deadlines to complete first-phase MDL discovery and address privilege log issues.
 9 Doc. 249. Thereafter, the Court held periodic status conferences to ensure that the parties
 10 were on task and to address routine discovery issues and disputes. In addition to the
 11 status conferences, the Court conducted telephone hearings to address time-sensitive
 12 issues, as well as numerous additional conferences to consider various matters such as
 13 general case management issues, dispositive motions, the bellwether trial process, and the
 14 settlement process.

15 **F. Discovery.**

16 **1. General Fact Discovery.**

17 Prior to the establishment of this MDL, Plaintiffs’ counsel had conducted
 18 substantial discovery against Bard concerning all aspects of Bard IVC filters, including
 19 the design, testing, manufacturing, marketing, labeling, and post-market surveillance of
 20 the devices. Bard produced numerous documents and ESI and responded to thousands of
 21 written discovery requests, and more than 80 corporate witness depositions were taken.
 22 The pre-MDL fact discovery was made available by Bard to all Plaintiffs in the MDL.

23 CMO 8 established a procedure concerning re-deposing witnesses in the MDL.
 24 Doc. 519. CMO 14 established deposition protocols generally. Doc. 2239. The Court
 25 allowed additional depositions of a handful of corporate witnesses that had been
 26 previously deposed, as well as numerous depositions of other Bard corporate witnesses,
 27 including several Rule 30(b)(6) depositions. Docs. 3685, 4311. CMO 9 governed the
 28 production of ESI and hard-copy documents. Doc. 1259.

1 Discovery in the MDL was separated into phases. The parties completed the first
2 phase of MDL discovery in early 2016. Doc. 519. The first phase included production of
3 documents related to an FDA inspection and warning letter to Bard, an updated
4 production of complaint and adverse event files, and an updated version of Bard's
5 complaint database relating to IVC filters. Doc. 249. Plaintiffs also conducted a Rule
6 30(b)(6) deposition concerning the FDA inspection and warning letter, and a deposition
7 of corporate witness Kay Fuller.

8 The parties completed the second phase of fact discovery in February 2017.
9 CMO 8 set deadlines for the second phase, which included all common fact and
10 expert issues in the MDL, but not case-specific issues to be resolved after remand or
11 transfer. Docs. 249, 519. Second-phase discovery included extensive additional
12 discovery related to Bard's system architecture for ESI, Bard's ESI collection efforts, ESI
13 relating to Bard's IVC filters, and Bard's national and regional sales and marketing
14 practices. Plaintiffs also deposed two corporate witnesses in connection with Kay
15 Fuller's allegations that a submission to the FDA regarding the Recovery filter did not
16 bear her original signature. Doc. 1319 (CMO 10). Plaintiffs deposed additional
17 corporate witnesses concerning the FDA inspections and warning letter. *Id.*

18 Bard also produced discovery regarding the sales and marketing materials related
19 to the SNF, documents comparing filter performance and failure rates to the SNF, and
20 internal and regulatory communications relating to the SNF. Docs. 1319, 10489. The
21 Court denied Plaintiffs' request to obtain ESI discovery from Bard's overseas operations.
22 Doc. 3398. The Court also denied Defendants' request to discover communications
23 between Plaintiffs' counsel and NBC news related to stories about the products at issue in
24 this litigation, and third-party financing that may be in place with respect to MDL
25 Plaintiffs. Docs. 3313, 3314. Plaintiffs were required to produce communications
26 between Plaintiffs and the FDA related to the FDA warning letter, but the Court denied
27 Defendants' request to depose Plaintiffs' counsel regarding these communications.
28

1 Docs. 3312, 4339. Defendants also produced punitive damages discovery, and Plaintiffs
 2 conducted a Rule 30(b)(6) deposition related to Bard's net worth.

3 All common fact discovery has now been completed, including preservation
 4 depositions for certain witnesses who will not be traveling to testify live at the trials of
 5 remanded and transferred cases. *See* Docs. 16343, 19959, 21063. Thus, courts receiving
 6 these cases need not be concerned with facilitating general fact discovery on remand or
 7 transfer.

8 **2. Case-Specific Discovery.**

9 CMO 5 governed initial case-specific discovery and required the parties to
 10 exchange abbreviated profile forms. Doc. 365 (as amended by Doc. 927). Plaintiffs were
 11 required to provide Defendants with a Plaintiff profile form ("PPF") that described
 12 individual conditions and claims. *Id.* at 5-9. Upon receipt of a substantially complete
 13 PPF, Defendants were required to provide the individual Plaintiff with a Defendants'
 14 profile form ("DPF") that disclosed information and documents concerning Defendants'
 15 contacts and relationship with Plaintiff's physicians, tracking and reporting of Plaintiff's
 16 claims, and certain manufacturing related information for Plaintiff's filter. *Id.* at 12-14.
 17 Completed profile forms were considered interrogatory answers under Rule 33 or
 18 responses to requests for production under Rule 34, and were governed by the standards
 19 applicable to written discovery under Rules 26 through 37. *Id.* at 2-3. CMO 5 also set
 20 deadlines and procedures for resolving any purported deficiencies with the parties'
 21 profile forms, and for dismissal of cases that did not provide substantially completed
 22 profile forms. *Id.* at 2. The Court has dismissed certain cases where Plaintiffs failed to
 23 provide complete PPFs. *See* Docs. 19874, 20667, 21461, 21579.

24 Further discovery was conducted in a group of 48 cases ("Group 1") selected for
 25 consideration in the bellwether trial process from the pool of cases filed and properly
 26 served on Defendants in the MDL as of April 1, 2016 ("Initial Plaintiff Pool").
 27 Docs. 1662, 3214, 4311 (CMOs 11, 15, 19). Plaintiffs in Group 1 were required to
 28 provide Defendants with a Plaintiff fact sheet ("PFS") that described their individual

1 conditions and claims in greater detail, and provided detailed disclosures concerning their
 2 individual background, medical history, insurance, fact witnesses, prior claims, and
 3 relevant documents and records authorizations. Docs. 1153-1, 1662 at 3.

4 Upon receipt of a PFS, Defendants were required to provide the individual
 5 Plaintiff with a Defendants fact sheet (“DFS”) that disclosed in greater detail information
 6 concerning Defendants’ contacts and relationship with Plaintiff, Plaintiff’s physicians, or
 7 anyone on behalf of Plaintiff, Defendants’ tracking and reporting of Plaintiff’s claims,
 8 sales and marketing information for the implanting facility, manufacturing information
 9 for Plaintiff’s filter, and other relevant documents. Docs. 1153-2, 1662 at 3. Completed
 10 fact sheets were considered interrogatory answers under Rule 33 or responses to requests
 11 for production under Rule 34, and were governed by the standards applicable to written
 12 discovery under Rules 26 through 37. Doc. 1662 at 3. CMO 11 set deadlines and
 13 procedures for resolving any purported deficiencies with the parties’ fact sheets. *Id.*
 14 at 2, 4-5. CMO 12 governed records discovery for Group 1. Doc. 1663. The parties
 15 agreed to use The Marker Group to collect medical, insurance, Medicare, Medicaid,
 16 prescription, Social Security, workers’ compensation, and employment records for
 17 individual plaintiffs from third-parties designated as custodians for such records in the
 18 PFS. *Id.* at 1.

19 From Group 1, twelve cases were selected for further consideration as bellwether
 20 cases (“Discovery Group 1”). Docs. 1662, 3685, 4311 (CMOs 11, 18, 19). CMO 20 set
 21 deadlines for preliminary case-specific discovery in that group. Doc. 4335. Pursuant to
 22 the protocols set in CMOs 14 and 21, the parties were permitted to depose each Plaintiff,
 23 his or her spouse or a significant family member, the implanting physician, an additional
 24 treating physician, and either a Bard sales representative or supervisor. Docs. 2239, 4866
 25 at 1-2. From Discovery Group 1, six Plaintiffs were selected for potential bellwether
 26 trials and further case-specific discovery (“Bellwether Group 1”). Docs. 1662, 3685,
 27 4311, 5770, 11659 (CMOs 11, 18, 19, 23, and 34).

28

1 Except for the 48 cases in Group 1, the parties did not conduct case-specific fact
2 discovery for the cases listed on Schedules A and B during the MDL proceedings, other
3 than exchanging abbreviated profile forms. The Court concluded that any additional
4 case-specific discovery in these cases should await their remand or transfer. Thus, courts
5 receiving these cases should set a schedule for the completion of case-specific discovery.

6 **3. Expert Discovery.**

7 CMO 8 governed expert disclosures and discovery. Doc. 519. The parties
8 designated general experts in all MDL cases and case-specific experts in individual
9 bellwether cases. General expert discovery closed July 14, 2017. Doc. 3685 (CMO 18).
10 The parties did not conduct case-specific expert discovery for the cases listed on
11 Schedules A and B during the MDL proceedings. The Court concluded that case-specific
12 expert discovery in these cases should await their remand or transfer. Thus, courts
13 receiving these cases should set a schedule for the completion of case-specific expert
14 discovery.

15 **4. Privileged Materials.**

16 CMO 2 required Defendants to produce privilege logs in compliance with the
17 Federal Rules of Civil Procedure. Doc. 249. The parties were then required to engage in
18 an informal privilege log meet and confer process to resolve any privilege disputes.
19 Defendants produced several privilege logs identifying documents withheld pursuant to
20 the attorney-client privilege, the work-product doctrine, and other privileges. The parties
21 regularly met and conferred regarding the privilege logs and engaged in negotiations
22 regarding certain entries identified by Plaintiffs. As part of that meet and confer process,
23 Defendants provided Plaintiffs with a small number of these identified items for
24 inspection and, in some cases, withdrew certain claims of attorney-client privilege and
25 produced the previously withheld items.

26 CMO 3 governed the non-waiver of any privilege or work-product protection in
27 this MDL, pursuant to Federal Rule of Evidence 502(d), by Defendants' disclosure or
28

1 production of documents on its privilege logs as part of the meet and confer process.
 2 Doc. 314.

3 In late 2015, Plaintiffs challenged a substantial number of documents on
 4 Defendants' privilege log. The parties engaged in an extensive meet and confer process,
 5 and Defendants produced certain documents pursuant to the Rule 502(d) order. *See id.*
 6 Plaintiffs moved to compel production of 133 disputed documents. The Court granted
 7 the motion in part. Doc. 2813. The parties identified several categories of disputed
 8 documents and provided sample documents for in camera review. The Court denied
 9 Plaintiffs' motion with respect to seven of eight categories of documents and found only
 10 one of the sample documents in one of the categories to contain unprivileged portions
 11 that should be produced. The Court found all other documents protected by the attorney-
 12 client privilege or work product doctrine. The Court directed the parties to use this ruling
 13 as a guide to resolve remaining privilege disputes.

14 Since this ruling, there have been no further challenges to Defendants' privilege
 15 logs. Defendants continued to provide updated privilege logs throughout the discovery
 16 process, and the parties met and conferred to resolve privilege disputes. Privilege issues
 17 should not be a concern for courts that receive these cases.

18 **5. Protective Order and Confidentiality.**

19 A stipulated protective order governing the designation, handling, use, and
 20 disclosure of confidential discovery materials was entered in November 2015. Doc. 269.
 21 CMO 7, entered January 5, 2016, governed redactions of material from additional
 22 adverse event reports, complaint files, and related documents in accordance with the
 23 Health Insurance Portability Act of 1996 ("HIPAA") and under 21 C.F.R. § 20.63(f).
 24 Doc. 401.

25 In September 2016, to expedite production of ESI, the parties agreed to a primarily
 26 "no-eyes-on" document production as to relevancy while still performing a privilege
 27 review for this expedited ESI document production. CMO 17 (Doc. 3372) modified the
 28 protections and requirements in the stipulated protective order (Doc. 269) and CMO 7

1 (Doc. 401) for ESI produced pursuant to this process. CMO 17 was amended in
 2 November 2016. Doc. 4015.

3 Defendants filed a motion to seal certain trial exhibits at the conclusion of the first
 4 bellwether trial. Doc. 11010. The Court denied this motion and Defendants' subsequent
 5 motion for reconsideration. Docs. 11642, 11766, 12069. Defendants also filed a motion
 6 to enforce the protective order for the second and third bellwether trials collectively.
 7 Doc. 13126. This motion was denied. Doc. 14446. A list of exhibits admitted at the
 8 bellwether trials (excluding case-specific medical records) and documents deemed no
 9 longer subject to the protective order are attached as Exhibit 2. *See* Doc. 21727-2.

10 **G. Bellwether Cases and Trials.**

11 Six Plaintiffs were selected for potential bellwether trials. Docs. 5770, 11659
 12 (CMOs 23, 34). The Court held three bellwether trials: *Booker*, No. CV-16-00474,
 13 *Jones*, No. CV-16-00782, and *Hyde*, No. CV-16-00893. The Court granted summary
 14 judgment in one of the bellwether cases, *Kruse*, No. CV-15-01634, and removed another
 15 from the bellwether trial schedule at the request of Plaintiffs, *Mulkey*, No. CV-16-00853.
 16 Docs. 12202, 13329. The final bellwether case, *Tinlin*, No. CV-16-00263, settled shortly
 17 before trial in May 2019. The Court determined that further bellwether trials were not
 18 necessary. Docs. 12853, 13329 (CMOs 38, 40).

19 **1. *Booker*, No. CV-16-00474.**

20 The first bellwether trial concerned Plaintiff Sherr-Una Booker and involved a
 21 Bard G2 filter. The filter had tilted, migrated, and fractured. Plaintiff required open
 22 heart surgery to remove the fractured limbs and repair heart damage caused by a
 23 percutaneous removal attempt. Plaintiff withdrew her breach of warranty claims before
 24 Defendants moved for summary judgment. The Court granted Defendants' motion for
 25 summary judgment on the claims for manufacturing defects, failure to recall,
 26 misrepresentation, negligence per se, and breach of warranty. Docs. 8873, 8874; *see In*
 27 *re Bard IVC Filters Prods. Liab. Litig.*, No. CV-16-00474-PHX-DGC, 2017 WL
 28 5625548 (D. Ariz. Nov. 22, 2017). The remaining claims for failure to warn, design

1 defect, and punitive damages were tried to a jury over a three-week period in March
 2 2018.

3 The jury found for Plaintiff Booker on her negligent failure-to-warn claim, and in
 4 favor of Defendants on the design defect and strict liability failure-to-warn claims.
 5 Doc. 10595. The jury returned a verdict of \$2 million in compensatory damages (of
 6 which \$1.6 million was attributed to Defendants after apportionment of fault) and
 7 \$2 million in punitive damages. *Id.*; Doc. 10596. The Court denied Defendants' motions
 8 for judgment as a matter of law and a new trial. Docs. 10879, 11598; *see In re Bard IVC*
 9 *Filters Prods. Liab. Litig.*, No. CV-16-00474-PHX-DGC, 2018 WL 3037161 (D. Ariz.
 10 June 19, 2018).

11 Defendants appealed, arguing that the Court erred by denying summary judgment
 12 on their preemption defense, that a failure-to-warn claim was unavailable, and that the
 13 award of punitive damages was not supported by the evidence. *See* Docs. 11934, 11953.
 14 The Ninth Circuit affirmed. Docs. 21555, 21632; *see In re Bard IVC Filters Prods. Liab.*
 15 *Litig.*, 969 F.3d 1067 (9th Cir. 2020). The Ninth Circuit denied Defendants' petition for
 16 panel rehearing and rehearing en banc. *See* No. 18-16349, Doc. 84.²

17 **2. Jones, No. CV-16-00782.**

18 The second bellwether trial concerned Plaintiff Doris Jones and involved a Bard
 19 Eclipse filter. Plaintiffs withdrew the manufacturing defect, failure to recall, and breach
 20 of warranty claims. The Court granted summary judgment on the misrepresentation,
 21 negligence per se, and unfair trade practices claims. Doc. 10404; *see In re Bard IVC*
 22 *Filters Prods. Liab. Litig.*, No. CV-16-00782-PHX-DGC, 2018 WL 1256768 (D. Ariz.
 23 Mar. 12, 2018). The remaining claims for failure to warn, design defect, and punitive
 24 damages were tried to a jury over a three-week period in May 2018. The jury returned a
 25 defense verdict. Doc. 11350. Plaintiff filed a motion to contact the jurors, which was

27 ² Plaintiff filed and later dismissed with prejudice a cross-appeal. Docs. 12070,
 28 17916.

1 denied. Docs. 11663, 12068.

2 Plaintiff appealed the Court's rulings excluding cephalad migration death
 3 evidence. *See* Docs. 12057, 12071, 21554, 21610, 21656. The Ninth Circuit affirmed
 4 those rulings. Docs. 21544, 21656; *see In re Bard IVC Filters Prods. Liab. Litig.*, 816 F.
 5 App'x 218 (9th Cir. 2020). The Ninth Circuit denied Plaintiff's petition for rehearing en
 6 banc. *See* No. 18-16461, Doc. 54.

7 **3. Kruse, No. CV-15-01634.**

8 Plaintiff Carol Kruse's case was set for trial in September 2018. The Court
 9 granted Defendants' summary judgment motion on statute of limitations grounds.
 10 Doc. 12202; *see In re Bard IVC Filters Prods. Liab. Litig.*, No. CV-15-01634-PHX-
 11 DGC, 2018 WL 3957737 (D. Ariz. Aug. 17, 2018).

12 **4. Hyde, No. CV-16-00893.**

13 The third bellwether trial concerned Plaintiff Lisa Hyde and involved either a Bard
 14 G2X or Eclipse filter (the exact model was in dispute). Ms. Hyde's case was moved to
 15 the September 2018 bellwether slot in lieu of Ms. Kruse's case. Doc. 11867. Plaintiffs
 16 withdrew their claims for manufacturing defect and breach of express warranty. The
 17 Court granted summary judgment on the claims for breach of implied warranty, failure to
 18 warn, failure to recall, misrepresentation, concealment, and fraud. Doc. 12007; *see In re*
 19 *Bard IVC Filters Prods. Liab. Litig.*, No. CV-16-00893-PHX-DGC, 2018 WL 3586404
 20 (D. Ariz. July 26, 2018). The Court also entered judgment in favor of Defendants on the
 21 negligence per se claim after concluding that it was impliedly preempted under 21 U.S.C.
 22 § 337(a). Doc. 12589; *see In re Bard IVC Filters Prods. Liab. Litig.*, No. CV-16-00893-
 23 PHX-DGC, 2018 WL 4356638 (D. Ariz. Sept. 12, 2018). The remaining claims for
 24 design defect, loss of consortium, and punitive damages were tried to a jury over three
 25 weeks in September 2018. After the close of Plaintiffs' evidence, the Court granted in
 26 part Defendants' motion for judgment as a matter of law with respect to future damages
 27 for any cardiac arrhythmia Ms. Hyde may experience, but denied the motion as to the
 28 remaining claims. Doc. 12805; *see In re Bard IVC Filters Prods. Liab. Litig.*, No. CV-

1 16-00893-PHX-DGC, 2018 WL 4742976 (D. Ariz. Oct. 2, 2018). The jury returned a
 2 defense verdict. Doc. 12891. Plaintiff voluntarily dismissed her appeal. *See* Docs.
 3 13465, 13480, 21732.

4 **5. Mulkey, No. CV-16-00853.**

5 Plaintiff Debra Mulkey's case involved an Eclipse filter and was set for trial in
 6 February 2019. Before trial, Plaintiffs asked the Court to remove the Mulkey case from
 7 the bellwether trial schedule because it was similar to the Jones and Hyde cases and
 8 would not provide meaningful information to the parties. Doc. 12990. The Court
 9 granted the motion. Doc. 13329.

10 **6. Tinlin, No. CV-16-00263.**

11 The final bellwether trial concerned Plaintiff Debra Tinlin and involved a Bard
 12 Recovery filter. Plaintiffs withdrew their claims for manufacturing defect, failure to
 13 recall, negligence per se, and breach of warranty. The Court granted summary judgment
 14 on the misrepresentation and deceptive trade practices claims. Doc. 17008. The
 15 remaining claims for failure to warn, design defect, concealment, loss of consortium, and
 16 punitive damages were scheduled for trial in May 2019, but the case settled.

17 **H. Key Legal and Evidentiary Rulings.**

18 The Court has made many rulings in this MDL that could affect the remanded and
 19 transferred cases. The Court provides the following summary of key legal and
 20 evidentiary rulings to assist the courts that receive these cases.

21 **1. Medical Monitoring Class Action Ruling.**

22 In May 2016, Plaintiffs' counsel filed a medical monitoring class action that was
 23 consolidated with the MDL. *See Barraza v. C. R. Bard, Inc.*, No. CV-16-01374-PHX-
 24 DCG (D. Ariz. May 5, 2015). The *Barraza* Plaintiffs moved for class certification for
 25 medical monitoring relief on behalf of themselves and classes of individuals who have
 26 been implanted with a Bard IVC filter, have not had that filter removed, and have not
 27 filed a claim or lawsuit for personal injury related to the filter. *Id.*, Doc. 54. The Court
 28 declined to certify the class. *Id.*, Doc. 95.

1 The class certification motion recognized that only 16 states permit claims for
 2 medical monitoring. The Court concluded that the classes could not be certified under
 3 Rule 23(b)(3) because individual issues would predominate. *Id.* at 20-21. The Court
 4 further concluded that the class could not be certified under Rule 23(b)(2) because the
 5 medical monitoring relief primarily constituted monetary rather than injunctive relief, and
 6 the class claims were not sufficiently cohesive to permit binding class-wide relief. *Id.*
 7 at 21-32. Finally, the Court concluded that typicality under Rule 23(a)(3) had not been
 8 established. *Id.* at 32-34. The *Barazza* Plaintiffs dismissed their claims without
 9 prejudice. Docs. 106, 107. No appeal has been filed.

10 **2. Federal Preemption Ruling.**

11 Defendants moved for summary judgment on the grounds that Plaintiffs' state law
 12 claims are expressly preempted by the Medical Device Amendments of 1976 ("MDA"),
 13 21 U.S.C. § 360 et seq., and impliedly preempted by the MDA under the Supreme
 14 Court's conflict preemption principles. Doc. 5396. The Court denied the motion.
 15 Doc. 8872; *see In re Bard IVC Filters Prods. Liab. Litig.*, No. MDL 15-02641-PHX
 16 DGC, 2017 WL 5625547 (D. Ariz. Nov. 22, 2017).

17 The MDA curtails state regulation of medical devices through a provision that
 18 preempts state requirements that differ from or add to federal requirements. 21 U.S.C.
 19 § 360k. The Bard IVC filters at issue in this litigation were cleared for market by the
 20 FDA through section "510k" review, which focuses primarily on equivalence rather than
 21 safety and effectiveness. *See* § 360c(f)(1)(A).

22 The Supreme Court in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), held that
 23 § 360k does not preempt state law claims directed at medical devices cleared through
 24 the 510(k) process because substantial equivalence review places no federal requirements
 25 on a device. *Id.* at 492-94. *Lohr* also noted that the "510(k) process is focused on
 26 *equivalence, not safety.*" *Id.* at 493 (emphasis in original). Although the Safe Medical
 27 Devices Act of 1990 ("SMDA"), Pub. L. 101-629, injected safety and effectiveness
 28 considerations into 510(k) review, it did so only comparatively. The Court found that

1 *Lohr* remains good law and that clearance of a product under 510(k) generally does not
 2 preempt state common law claims. Doc. 8872 at 12-14.

3 The Court further found that Defendants failed to show that the 510(k) reviews for
 4 Bard IVC filters imposed device-specific requirements as needed for preemption under
 5 § 360k. *Id.* at 14-20. Even if device-specific federal requirements could be ascertained,
 6 Defendants made no showing that any particular state law claim is expressly preempted
 7 by federal requirements. *Id.* at 21-22.

8 The Court concluded that Plaintiffs' state law claims are not impliedly preempted
 9 because Defendants failed to show that it is impossible to do under federal law what the
 10 state laws require. *Id.* at 22-24. Defendants pursued their preemption arguments in the
 11 Booker appeal. Docs. 11934, 11953. As noted, the Ninth Circuit affirmed the Court's
 12 preemption ruling. *See* Docs. 21555, 21632; *In re Bard*, 969 F.3d at 1072-76.

13 **3. The Lehmann Report Privilege and Work Product Rulings.**

14 The Court granted Defendants' motion for a protective order to prevent Plaintiffs
 15 from using a December 15, 2004 report of Dr. John Lehmann. Doc. 699. Dr. Lehmann
 16 provided various consulting services to Bard at different times. Following Bard's receipt
 17 of potential product liability claims involving the Recovery filter, Bard's legal
 18 department retained Dr. Lehmann in November 2004 to provide an assessment of the
 19 risks associated with the Recovery filter and the extent of Bard's legal exposure.
 20 Dr. Lehmann prepared a written report of his findings at the request of the legal
 21 department and in anticipation of litigation. The Court found the report to be protected
 22 from disclosure by the work product doctrine. *Id.* at 4-12. The Court further found that
 23 Plaintiffs had not shown a substantial need for the report or undue hardship if the report
 24 was not disclosed. *Id.* at 13-15. The Court agreed with the parties that this ruling does
 25 not alter any prior rulings by transferor judges in specific cases. *Id.* at 22.

26 **4. Daubert Rulings.**

27 The Court has ruled on *Daubert* motions directed at general experts, and refers the
 28 remand and transfer courts to the following orders:

	<i>Daubert Order</i>	Doc. Nos.
1	Plaintiffs' Expert Dr. Thomas Kinney	9428, 10323
2	Plaintiffs' Experts Drs. Scott Resnick, Robert Vogelzang, Kush Desai, and Robert Lewandowski	9432
3	Plaintiffs' Experts Drs. David Kessler and Suzanne Parisian	9433
4	Plaintiffs' Experts Drs. Thomas Kinney, Anne Christine Roberts, and Sanjeeva Kalva	9434
5	Plaintiffs' Expert Dr. Mark Eisenberg	9770
6	Plaintiffs' Expert Dr. Derek Muehrcke	9771
7	Plaintiffs' Expert Dr. Darren Hurst	9772
8	Plaintiffs' Expert Dr. Rebecca Betensky	9773
9	Defendants' Expert Dr. Clement Grassi	9991, 10230
10	Plaintiffs' Expert Dr. Robert McMeeking	10051, 16992
11	Plaintiffs' Expert Dr. Robert Ritchie	10052
12	Plaintiffs' Experts Drs. David Garcia and Michael Streiff	10072
13	Defendants' Expert Dr. Christopher Morris	10230, 10231, 17285

1 **5. Motion in Limine Rulings.**

2 **a. FDA Evidence (*Cisson Motion*).**

3 In the Booker bellwether trial, Plaintiffs sought to exclude, under Federal Rules of
 4 Evidence 402 and 403, evidence of the FDA's 510(k) clearance of Bard IVC filters and
 5 the lack of FDA enforcement action against Bard. Doc. 9529. The Court denied the
 6 motion. Docs. 9881, 10323.

7 The Court found that under Georgia law, which applied in both the Booker and
 8 Jones bellwether cases, compliance with federal regulations may not render a
 9 manufacturer's design choice immune from liability, but evidence of Bard's compliance
 10 with the 510(k) process was nonetheless relevant to the design defect and punitive
 11 damages claims. Doc. 9881 at 3-4. The Court acknowledged concerns that FDA
 12 evidence might mislead the jury or result in a mini-trial. *Id.* at 5-6 (citing *In re C.R.*
 13 *Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig. (Cisson)*, No. 2:10-CV-01224, 2013 WL
 14 3282926, at *2 (S.D.W. Va. June 27, 2013)). But the Court concluded that such concerns
 15 could adequately be addressed by efficient management of the evidence and adherence to
 16 the Court's time limits for trial, and, if necessary, by a limiting instruction regarding the
 17 nature of the 510(k) process. *Id.* at 6-7.³

18 The Court noted that the absence of any evidence regarding the 510(k) process
 19 would run the risk of confusing the jury, as many of the relevant events in this litigation
 20 occurred in the context of the FDA's 510(k) review of the Bard filters and are best
 21 understood in that context. Doc. 9881 at 7. Nor was the Court convinced that all FDA
 22 references could adequately be removed from the evidence. *Id.*

23 The Court further concluded that it would not exclude evidence and arguments by
 24 Defendants that the FDA took no enforcement action against Bard with respect to the G2
 25 or Eclipse filters, or evidence regarding information Bard provided to the FDA in

27 ³ The Court did not find a limiting instruction necessary at the close of either the
 28 Booker or Jones trials. See Doc. 10694 at 9.

1 connection with the 510(k) process. Docs. 10323 at 2-3 (Booker), 11011 at 4-5 (Jones).
 2 The Court found that the evidence was relevant to the negligent design and punitive
 3 damages claims under Georgia law. *Id.* The Court determined at trial that it had no basis
 4 to conclude that the FDA's lack of enforcement was intended by the FDA as an assertion,
 5 and therefore declined to exclude the evidence as hearsay. Doc. 10568 at 87.

6 **b. FDA Warning Letter.**

7 Defendants moved to exclude evidence of the July 13, 2015 FDA warning letter
 8 issued to Bard. Doc. 9864 at 2-3. The Court granted the motion in part, excluding as
 9 irrelevant topics 1, 2, 4(a), 4(b), 5, 6, 7, and 8 of the warning letter. Docs. 10258 at 6-8
 10 (Booker), 10805 at 1 (Jones), 12736 (Hyde), 17401 at 10 (Tinlin). Topics 1 and 2
 11 concern the Recovery Cone retrieval system; Topic 4(a) concerns the filter cleaning
 12 process; and Topics 4(b), 5, 6, 7, and 8 concern the Denali Filter. The Court concluded
 13 that none of these topics was relevant to the issues in the bellwether cases involving a G2
 14 filter (Booker), an Eclipse filter (Jones), either a G2X or Eclipse filter (Hyde), and a
 15 Recovery filter (Tinlin). *Id.*

16 The Court deferred ruling on the relevance of topic 3 until trial in all bellwether
 17 cases. The Court found that topic 3, concerning Bard's complaint handling and reporting
 18 of adverse events with respect to the G2 and Eclipse filters, as well as the adequacy of
 19 Bard's evaluation of the root cause of the violations, was relevant to rebut the implication
 20 at trial that the FDA took no action with respect to Bard IVC filters. *See* Doc. 10693
 21 at 13-15; Doc. 11256. The Court concluded that the warning letter was admissible under
 22 Federal Rule of Evidence 803(8), and was not barred as hearsay. Doc. 10258 at 7. The
 23 Court further concluded that the probative value of topic 3 was not substantially
 24 outweighed by the danger of unfair prejudice to Bard under Rule 403. *Id.* The Court
 25 admitted the warning letter in redacted form during the three bellwether trials. *See*
 26 Docs. 10565, 11256, 12736. The Court noted that topic 3 included reference to the G2,
 27 the filter at issue in Booker, and reached similar conclusions in Jones and Hyde.
 28 Doc. 17401 at 11. The parties disputed the relevance of topic 3 in Tinlin because it did

1 not include reference to the Recovery, the filter at issue in Tinlin. *Id.* The Court did not
 2 decide this issue because the Tinlin case settled.

3 **c. Recovery Cephalad Migration Death Evidence.**

4 Defendants moved to exclude evidence of cephalad migration (i.e., migration of
 5 the filter toward the patient's heart) by a Recovery filter resulting in patient death. The
 6 Court denied the motion for the Booker bellwether trial, which involved a G2 filter.
 7 Docs. 10258 at 4-5, 10323 at 4.

8 The Court granted the motion for the Jones bellwether trial, which involved an
 9 Eclipse filter, and denied Plaintiff's requests for reconsideration of the ruling before and
 10 during the trial. *See* Docs. 10819, 10920, 11041, 11113, 11256, 11302; *see also*
 11 Doc. 11409 at 94-96. The Ninth Circuit affirmed those rulings. Docs. 21554, 21610,
 12 21656; *see In re Bard*, 816 F. App'x at 219. The Ninth Circuit denied Plaintiff's petition
 13 for rehearing en banc. *See* No. 18-16461, Doc. 54.

14 The Court granted the motion for the Hyde bellwether trial, which involved either
 15 a G2X or Eclipse filter. Doc. 12533 at 6-7. The Court denied Defendants' motion in the
 16 Tinlin case, which involved a Recovery filter. Doc. 17401 at 7-10.

17 The Court concluded for purposes of the Booker bellwether trial that evidence of
 18 cephalad migrations by a Recovery filter resulting in patient death was necessary for the
 19 jury to understand the issues that prompted creation and design of the next-generation G2
 20 filter, and thus was relevant to Plaintiff's design defect claims. Doc. 10323 at 4. In
 21 addition, because the Recovery filter was the predicate device for the G2 filter in
 22 Defendants' 510(k) submission to the FDA, and Defendants asserted to the FDA that the
 23 G2 was as safe and effective as the Recovery, the Court concluded that the safety and
 24 effectiveness of the Recovery filter was at issue. *Id.* The Court was concerned, however,
 25 that too heavy an emphasis on deaths caused by cephalad migration of the Recovery
 26 filter – a kind of migration which did not occur in the G2 filter generally or the Booker
 27 case specifically – would result in unfair prejudice to Defendants that substantially
 28

1 outweighed the probative value of the evidence. *Id.* Defendants did not object during
 2 trial that Plaintiffs were over-emphasizing the death evidence.

3 The Court initially concluded for purposes of the Jones bellwether trial, which
 4 involved an Eclipse filter, that evidence of cephalad migration deaths by the Recovery
 5 filter was inadmissible because it was only marginally relevant to Plaintiff's claims and
 6 its marginal relevancy was substantially outweighed by the risk of unfair prejudice. *See*
 7 Docs. 10819, 10920, 11041, 11113, 11256, 11302. This is because cephalad migration
 8 did not continue in any significant degree beyond the Recovery filter; cephalad migration
 9 deaths all occurred before the Recovery was taken off the market in late 2005; Ms. Jones
 10 did not receive her Eclipse filter until 2010; the Recovery-related deaths said nothing
 11 about three of Ms. Jones' four claims (strict liability design defect and the failure to warn
 12 claims); and instances of cephalad migration deaths were not substantially similar to
 13 complications experienced by Ms. Jones and therefore did not meet the Georgia standard
 14 for evidence on punitive damages. Docs. 10819, 11041.

15 The Court also found that deaths caused by a non-predicate device (the Recovery
 16 was not the predicate device for the Eclipse in Defendants' 510(k) submission), and by a
 17 form of migration that was eliminated years earlier, were of sufficiently limited probative
 18 value that their relevancy was substantially outweighed by the danger of unfair prejudice
 19 because the death evidence may prompt a jury decision based on emotion. *Id.* The Court
 20 further concluded that Plaintiff Jones would not be seriously hampered in her ability to
 21 prove Recovery filter complications, testing, and design when references to cephalad
 22 migration deaths are removed. Doc. 11041. As a result, the Court held that such
 23 references should be redacted from evidence presented during the Jones trial.

24 The Court balanced this concern with the competing concern that it would be
 25 unfair for Defendants to present statistics about the Recovery filter and not allow
 26 Plaintiffs to present competing evidence that included Recovery deaths. *See, e.g.,*
 27 Doc. 11391 at 12. Based on this concern, Plaintiffs argued at various points during the
 28 trial that Defendants had opened the door to presenting evidence about Recovery

1 cephalad migration deaths. The Court repeatedly made fact-specific determinations on
 2 this point, holding that even though Defendants presented some evidence that made the
 3 Recovery evidence more relevant, the danger of unfair prejudice continued to
 4 substantially outweigh the probative value of the cephalad migration death evidence. *See*
 5 Docs. 11113, 11302; *see also* Doc. 11409 at 94-96.

6 The Court concluded for purposes of the Hyde bellwether trial, which involved
 7 either a G2X or Eclipse filter, that evidence of Recovery filter cephalad migration deaths
 8 should be excluded under Rule 403 for the reasons identified in the Jones bellwether trial.
 9 Doc. 12533 at 6-7. The Court concluded that this evidence had marginal relevance to
 10 Plaintiff's claims because Ms. Hyde received either a G2X or Eclipse filter, two or three
 11 generations after the Recovery filter; Ms. Hyde did not receive her filter until 2011, more
 12 than five years after cephalad migration deaths stopped when the Recovery was taken off
 13 the market; the deaths did not show that G2X or Eclipse filters – which did not cause
 14 cephalad migration deaths – had design defects when they left Defendants' control; nor
 15 did the cephalad migration deaths, which were eliminated by design changes in the G2,
 16 shed light on Defendants' state of mind when designing and marketing the G2X and
 17 Eclipse filters. *Id.* at 7.

18 The Court concluded in the Tinlin case, which involved a Recovery filter, that
 19 Recovery deaths and Defendants' knowledge of those deaths were relevant to Plaintiffs'
 20 design defect claim under Wisconsin law because they went directly to the Recovery's
 21 foreseeable risks of harm and whether it was unreasonably dangerous. Doc. 17401
 22 at 7-8. The Court also concluded that the Recovery death evidence was relevant to
 23 Plaintiffs' failure to warn and concealment claims because it was probative on the
 24 causation issue – that is, whether her treating physician would have selected a different
 25 filter for Ms. Tinlin had he been warned about the Recovery's true risks, as Plaintiffs
 26 describe them. *Id.* at 8. In addition, because this evidence would be used to impeach
 27 expert testimony from Defendants that the Recovery filter was safe and effective, the
 28 Court concluded that substantial similarity was not required. *Id.* at 8-9. The Court

1 further concluded that the death evidence was relevant to Bard's state of mind and to
 2 show the reprehensibility of its alleged conduct for purposes of punitive damages. *Id.*
 3 at 9-10. The Court reached a different conclusion in the Jones and Hyde cases because
 4 cephalad migration deaths stopped when the Recovery was taken off the market in 2005,
 5 and the deaths shed little light on Defendants' state of mind when marketing different,
 6 improved filters years later. *Id.* at 9 n.4. As noted, the Tinlin case settled before trial.

7 **d. SNF Evidence.**

8 Plaintiffs sought to exclude evidence of complications associated with the SNF,
 9 claiming that they were barred from conducting relevant discovery into the design and
 10 testing of the SNF under CMO 10. Doc. 10487; *see* Doc. 1319. The Court denied
 11 Plaintiffs' request. Doc. 10489. The Court did not agree that Plaintiffs were foreclosed
 12 from obtaining relevant evidence for rebuttal. The Court foreclosed this discovery
 13 because Plaintiffs did not contend that the SNF was defective. *Id.* at 2. Plaintiffs also
 14 had rebuttal evidence showing that reported failure rates for SNF were lower than
 15 Recovery and G2 failure rates. *Id.* The Court ultimately concluded it would not preclude
 16 Defendants from presenting its SNF evidence on the basis of a discovery ruling and
 17 permitted Plaintiffs to make appropriate evidentiary objections at trial. *Id.* at 3.

18 **e. Use of Testimony of Withdrawn Experts.**

19 Defendants sought to preclude Plaintiffs' use at trial of the depositions of three
 20 defense experts – Drs. Moritz, Rogers, and Stein – who originally were retained by Bard
 21 but were later withdrawn in some or all cases. Doc. 10255 at 2. The Court denied the
 22 request in part. Doc. 10382. The Court found that Defendants failed to show that the
 23 depositions of these experts were inadmissible on hearsay grounds, but agreed that it
 24 would be unfairly prejudicial under Rule 403 to disclose to the jury that the experts
 25 originally were retained by Bard. *Id.* at 2-3. The Court therefore concluded that
 26 Plaintiffs could use portions of the experts' depositions that support Plaintiffs' claims, but
 27 could not disclose to the jury that the experts originally were retained by Bard. *Id.* at 3.
 28 The Court was concerned about the presentation of cumulative evidence, and therefore

1 required Plaintiffs to show that no other expert of similar qualifications was available or
2 that the unavailable expert had some unique testimony to contribute, before the
3 deposition of any withdrawn expert could be used at trial. *Id.* at 3-4.

f. Other Motion in Limine Rulings.

Other motion in limine (“MIL”) rulings may be useful to the receiving courts. See Docs. 10075, 10235, 10258, 10947. The courts are referred to the following motions and orders to assist in preparing for trial:⁴

- **Parties' Joint Stipulation on MILs in Booker:** The Court, on stipulation of the parties, excluded evidence concerning several case-specific issues in the Booker bellwether trial, as well as a few general issues, including: Bard's 1994 criminal conviction; other lawsuits or claims against Bard; advertising by Plaintiff's counsel; Plaintiff's counsel specializing in personal injury or products liability litigation; contingency fee agreements; and advertising by any counsel nationally for IVC filter cases. Doc. 10235.
 - **Defendants' MIL 1 in Booker:** The Court permitted evidence and testimony concerning Recovery complications. Doc. 10258 at 1-5; *see* Doc. 10819 (Jones). As noted above, the Court permitted evidence and testimony concerning Recovery filter cephalad migration deaths in the Booker bellwether trial involving a G2 filter (Doc. 10323 at 4), but excluded such evidence in the trials involving a G2X or Eclipse filter (Docs. 10819, 10920, 11041).
 - **Defendants' MIL 2 in Booker:** The Court permitted evidence and testimony relating to the development of the Recovery filter. Doc. 10258 at 5-6; *see* Doc. 10819 at 2-3 (Jones).
 - **Defendants' MIL 4 in Booker:** The Court excluded evidence and testimony concerning a photograph of Bard employee Michael Randall making an offensive gesture. Doc. 10075 at 1-2.
 - **Defendants' MIL 5 in Booker:** The Court permitted Plaintiff's expert Dr. Thomas Kinney to be called as a fact witness, but prohibited him from testifying regarding his prior work for Bard as an expert witness in two prior IVC filter cases or as a paid consultant to Bard. Docs. 10075 at 2-3, 10323 at 4.

⁴ The Court also ruled on the parties' MILs concerning several case-specific issues. See Docs. 10075 (Plaintiff's MIL 12 in Booker), 10258 (Plaintiff's MILs 6 and 13 in Booker), 10947 (Defendants' MIL 1 and Plaintiff's MILs 1-4 and 7 in Jones), 12533 (Plaintiff's MIL 3 in Hyde), 17285 (Plaintiff's MIL 1 in Tinlin), 17401 (Plaintiff's MILs 2, 3, and 6 in Tinlin).

- 1 • **Plaintiff's MIL 2 in Booker:** The Court reserved ruling until trial on evidence
2 and testimony regarding the nature of Bard's business, including the nature,
3 quality, and usefulness of its products, the conscientiousness of its employees,
4 and references to its mission statement. Doc. 10075 at 3-4.
- 5 • **Plaintiff's MIL 3 in Booker:** The Court permitted evidence and testimony
6 concerning the benefits of IVC filters, including testimony describing Bard
7 filters as "lifesaving" devices. Doc. 10258 at 8.
- 8 • **Plaintiff's MIL 4 in Booker:** The Court permitted evidence and testimony
9 that IVC filters, including Bard's filters, are within the standard of care for the
10 medical treatment of pulmonary embolism. Doc. 10258 at 8-9. Defendants
11 agreed to not characterize IVC filters as the "gold standard" for the treatment
12 of pulmonary embolisms. *Id.* at 8.
- 13 • **Plaintiff's MIL 5 in Booker:** The Court denied as moot the motion to exclude
14 evidence and argument relating to failure rates, complication rates,
15 percentages, or comparative analysis of any injuries that were not produced to
16 Plaintiffs during discovery, as all such information was produced. Doc. 10075
17 at 4.
- 18 • **Plaintiff's MIL 7 in Booker:** The Court excluded evidence and argument
19 relating to prior judicial opinions about Plaintiffs' experts, including the
20 number of times their testimony has been precluded in other cases. *Id.*
- 21 • **Plaintiff's MIL 8 in Booker:** The Court excluded evidence and argument that
22 a verdict against Defendants will have an adverse impact on the medical
23 community, future medical device research or costs, and the availability of
24 medical care. *Id.* at 4-5.
- 25 • **Plaintiff's MIL 9 in Booker:** The Court deferred ruling on the relevance of
26 statements or lack of statements from medical societies, including the Society
27 of Interventional Radiologists ("SIR"), until trial. Doc. 10258 at 14-18. The
28 Court ultimately admitted this evidence in both the Booker and Jones
bellwether trials.
- 29 • **Plaintiff's MIL 10 in Booker:** The Court excluded evidence and testimony
30 that Bard needed FDA consent to add warnings to its labels, send warning
31 letters to physicians and patients, or recall its filters. *Id.* at 18-19. The Court
32 permitted evidence and argument explaining the reasons why Bard filters were
33 not recalled, FDA's potential involvement in any recall effort, and the fact that
34 warnings about failure rates and increased risks could not be based on MDR
35 and MAUDE data alone. *Id.*
- 36 • **Plaintiff's MIL 11 in Booker:** The Court permitted evidence and argument
37 relating to the informed consent form signed by Plaintiff prior to insertion of
38 the IVC filter, even though the form is not specific to IVC filters or Bard
39 filters. Doc. 10075 at 5-6.
- 40 • **Plaintiff's MIL 14 in Booker:** The Court reserved ruling until trial on
41 evidence and argument relating to background information and personal traits
42 of Bard employees and witnesses. *Id.* at 7.

- 1 • **Plaintiff's MIL 6 in Jones:** The Court permitted evidence and testimony
2 concerning whether a party's expert had been retained by the same attorneys in
3 other litigation. Doc. 10947 at 8-9.
- 4 • **Plaintiff's MIL 5 in Jones:** The Court excluded evidence and testimony that
5 Bard employees or their relatives have received Bard IVC filter implants. *Id.*
6 at 9-10.
- 7 • **Defendants' MIL 2 in Jones:** The Court excluded evidence and testimony of
8 other lawsuits against Bard. *Id.* at 11.
- 9 • **Plaintiff's MILs 4 and 5 in Hyde:** The Court permitted evidence and testimony
10 concerning Bard's Instructions for Use ("IFU") and SIR Guidelines.
11 Doc. 12507.
- 12 • **Plaintiff's MIL 2 in Hyde:** The Court permitted evidence and testimony
13 concerning "The Surgeon General's Call to Action to Prevent Deep Vein
14 Thrombosis and Pulmonary Embolism." Doc. 12533 at 4-6.
- 15 • **Defendants' MIL 3 in Hyde:** The Court permitted evidence and testimony
16 that Bard's SNF is a reasonable alternative design. *Id.* at 7.
- 17 • **Defendants' MIL 4 in Hyde:** The Court excluded testimony from Dr.
18 Muehrcke about his personal feelings of betrayal and his moral and ethical
19 issues with Bard's conduct. *Id.* at 7-8.
- 20 • **Defendants' MIL 6 in Hyde:** The Court permitted evidence and testimony
21 regarding informed consent. *Id.* at 8-9.
- 22 • **Plaintiff's MIL 4 in Tinlin:** The Court reserved ruling until trial on evidence
23 and argument relating to a chart created by Defendants from their internal
24 TrackWise database regarding reporting rates of IVC filter complications.
25 Doc. 17401 at 5.
- 26 • **Plaintiff's MIL 5 in Tinlin:** The Court permitted evidence and testimony
27 concerning a chart comparing the sales of the permanent SNF with those of
28 retrievable filters between 2002 and 2016. *Id.* at 5-6.
- 29 • **Defendants' MIL 3 in Tinlin:** The Court permitted evidence and testimony
30 concerning the Recovery Filter Crisis Communications Plan that Bard had
31 prepared in 2004 to help manage damaging media coverage about a Recovery
32 migration death. *Id.* at 11-12.
- 33 • **Defendants' MIL 4 in Tinlin:** The Court excluded evidence and testimony
34 concerning Dr. Muehrcke's untimely disclosed opinion that one of his patients
35 died from cardiac tamponade caused by a fractured strut that had embolized to
36 her heart. *Id.* at 12-13.

1 **6. Deposition Designation Rulings.**

2 The Court has ruled on numerous objections to deposition designations for trial
 3 and refers the transferor courts to the following orders:⁵

Deponent	Depo. Date	Doc. No(s).
Bill Altonaga	10/22/2013	10497, 10922
Christine Brauer	05/23/2014 08/02/2017	10922, 10922
David Ciavarella	11/12/2013	10403
Gary Cohen	01/25/2017	10438
Robert Cortelezzi	11/11/2016	10438, 11064
Len DeCant	05/24/2016	10438, 11080
John DeFord	06/02/2016	10524, 11080
Mary Edwards	01/20/2014	10438
Robert Ferrara	04/17/2017	10438
Chris Ganser	10/11/2016	10438, 11073
Jason Greer	08/11/2014	10438, 10922
Janet Hudnall	11/01/2013	10403
Brian Hudson	01/17/2014	10403
John Lehmann	08/07/2014	10922
William Little	07/27/2016	10438, 11064
John McDermott	02/05/2014	10438

27

 28 ⁵ In addition to the depositions identified in the table above, the Court ruled on
 numerous objections to case-specific deposition designations for trial.

	Deponent	Depo. Date	Doc. No(s).
1	Patrick McDonald	07/29/2016	10486, 11064
2	Mark Moritz	07/18/2017	10922
3	Daniel Orms	08/16/2016	10403, 11073
4	Abithal Raji-Kubba	07/18/2016	11064
5	Gin Schulz	01/30/2014	10403
6	Christopher Smith	08/03/2017	11073
7	William Stavropoulos	02/01/2017	10524
8	Jack Sullivan	11/03/2016 09/16/2016	10486, 11080
9	Melanie Sussman	04/07/2017	11073
10	Mehdi Syed	03/02/2018	11313
11	Scott Trerotola	01/20/2017	10524
12	Douglas Uelman	10/04/2013	10403, 11080
13	Carol Vierling	05/11/2016	10486, 11073
14	Mark Wilson	01/31/2017	10922
15	Natalie Wong	10/18/2016	10403
16	John Worland	03/16/2011	17582
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23 **7. Subject Matter Jurisdiction Rulings.**

24 The parties identified cases in the MDL for which federal subject matter
 25 jurisdiction does not exist. Docs. 20210, 21410, 21552, 21995. No federal question
 26 jurisdiction exists under 28 U.S.C. § 1331 because the master complaint asserts no
 27 federal claim and the state law claims alleged in the complaint do not depend on the
 28 resolution of a federal law question. Doc. 364 ¶¶ 166-349. For purposes of diversity

1 jurisdiction under 28 U.S.C. § 1332, Defendant C. R. Bard, Inc. is a citizen of New Jersey
 2 and Defendant Bard Peripheral Vascular, Inc. is a citizen of Arizona. *See id.* ¶¶ 11-12.
 3 Thus, complete diversity between the parties does not exist in any case where each
 4 Defendant is a named party and Plaintiff is a resident of either Arizona or New Jersey.
 5 *See Doc. 20210-1.*

6 Plaintiffs in most of the cases without subject matter jurisdiction agreed to a
 7 dismissal without prejudice. *See id.* Plaintiffs in other cases opposed dismissal, but
 8 provided no reason why the cases should not be dismissed. *See id.* The Court dismissed
 9 without prejudice multiple cases for lack of subject matter jurisdiction. Docs. 20667,
 10 21461, 21579, 21741, 22014. Some of these cases may be refiled in state court. *See*
 11 *Doc. 20210-1.*

12 **8. Dismissal of Cases With Prejudice Under Rule 41(b).**

13 In more than 100 cases in which no settlement decision has been made, the
 14 Plaintiffs or their heirs either cannot be located or the Plaintiffs have been nonresponsive
 15 to counsel's repeated inquiries. *See Doc. 22012.* The Court has dismissed these cases
 16 with prejudice for failure to prosecute. Doc. 22034 and amended at Doc. 22035

17 **I. Further Proceedings in Remanded or Transferred Cases.**

18 **1. General Discovery.**

19 Because all general fact and expert discovery has been completed in this MDL, the
 20 courts receiving these cases need not be concerned with facilitating general expert,
 21 corporate, and third-party discovery. This observation is not meant to restrict the power
 22 of receiving courts for good cause or in the interest of justice to address issues that may
 23 be unique and relevant in a remanded or transferred case.

24 **2. Case-Specific Discovery and Trial Preparation.**

25 According to the parties, the status of the remaining discovery and other pretrial
 26 issues for the cases being remanded or transferred, and the estimated time needed to
 27 resolve such issues and make the cases ready for trial, will be determined on remand or
 28 transfer. Final trial preparation in the bellwether trials was governed by certain Court

1 orders. *See* Docs. 8871, 10323, 10587, 11011, 11320, 11321, 11659, 11871, 12061,
 2 12853, 12971.

3 **J. Documents to Be Sent to Receiving Courts.**

4 If the Panel agrees with the Court's suggestion of remand of the cases listed on
 5 Schedule A and issues a final remand order ("FRO"), the Clerk of the Court for this
 6 District will issue a letter to the transferor courts, via email, setting out the process for
 7 transferring the case. The letter and certified copy of the FRO will be sent to the
 8 transferor courts' email addresses.

9 The parties have submitted a stipulated designation of record for remanded cases.
 10 Doc. 21727-4; *see* J.P.M.L Rule 10.4(a). Upon receipt of the FRO, the Clerk of this
 11 District shall transmit to the transferor court the following: (1) a copy of the individual
 12 docket sheet for the remanded action, (2) a copy of the master docket sheet in this MDL,
 13 (3) the entire file for the remanded action, as originally received from the transferor
 14 district, and (4) the record on remand designated by the parties. *See* Doc. 21727-4;
 15 J.P.M.L Rule 10.4(b).

16 The Court has concluded that the cases listed on Schedule B should be transferred
 17 to appropriate districts pursuant to 28 U.S.C. § 1404(a). Upon receipt of this transfer
 18 order, the Clerk for this District shall follow the same procedures prescribed above for
 19 each of the individual cases listed on Schedule B.

20 If a party believes that the docket sheet for a particular case being remanded or
 21 transferred is not correct, a party to that case may, with notice to all other parties in the
 22 case, file with the receiving court a designation amending the record. Upon receiving
 23 such designation, the receiving court may make any needed changes to the docket. If the
 24 docket is revised to include additional documents, the parties should provide those
 25 documents to the receiving court.

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III. Conclusion.

Pursuant to 28 U.S.C. § 1404(a), the Clerk of this District is directed to transfer *Alarcon v. C. R. Bard, Inc.*, No. CV-17-00197, to the Central District of California, Los Angeles Division, for further proceedings.

IT IS SO ORDERED.

Dated this 22nd day of September, 2021.

David G. Campbell

David G. Campbell
Senior United States District Judge